No. 13512

United States
COURT OF APPEALS
for the Ninth Circuit

CLAUDE A. TAYLOR,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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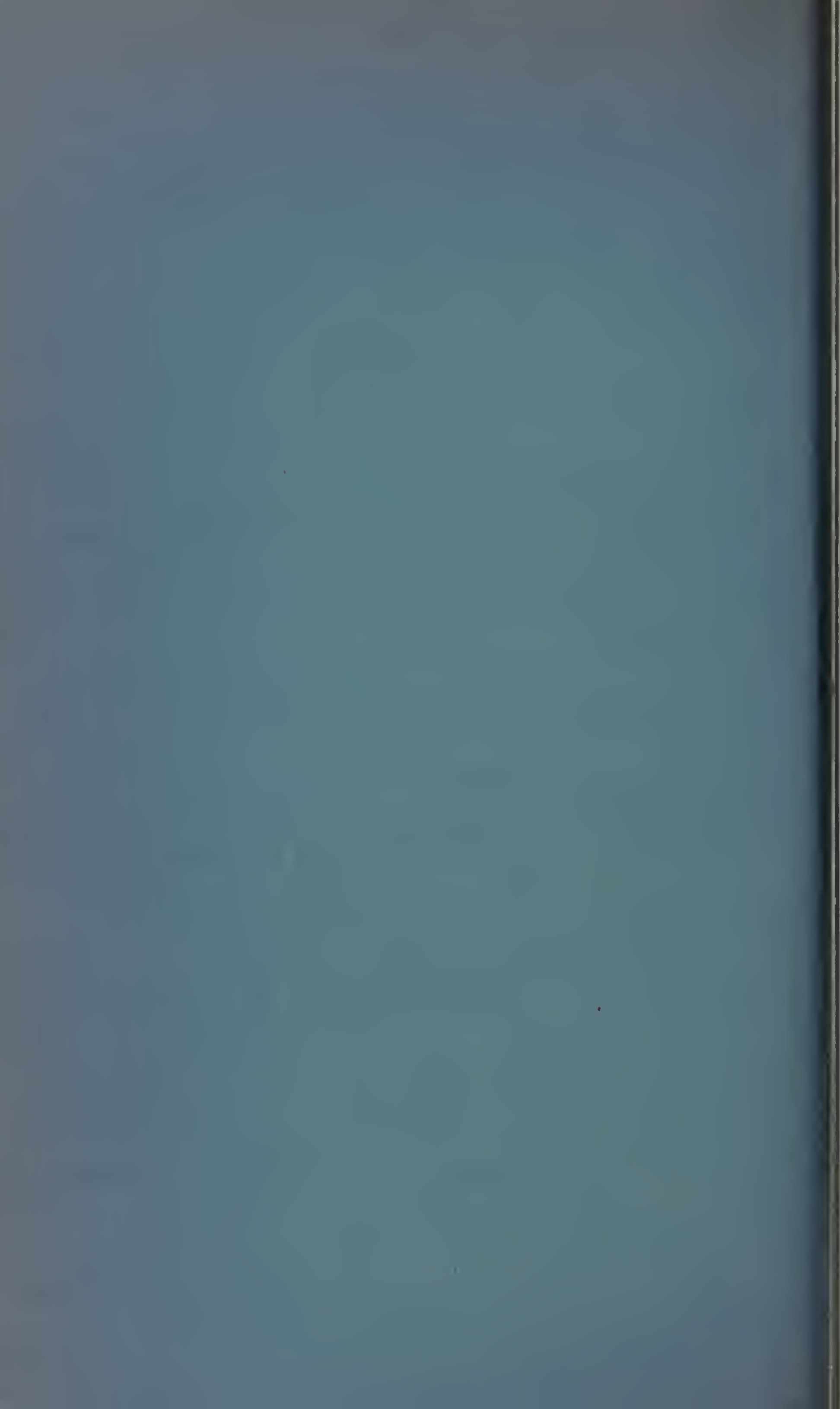

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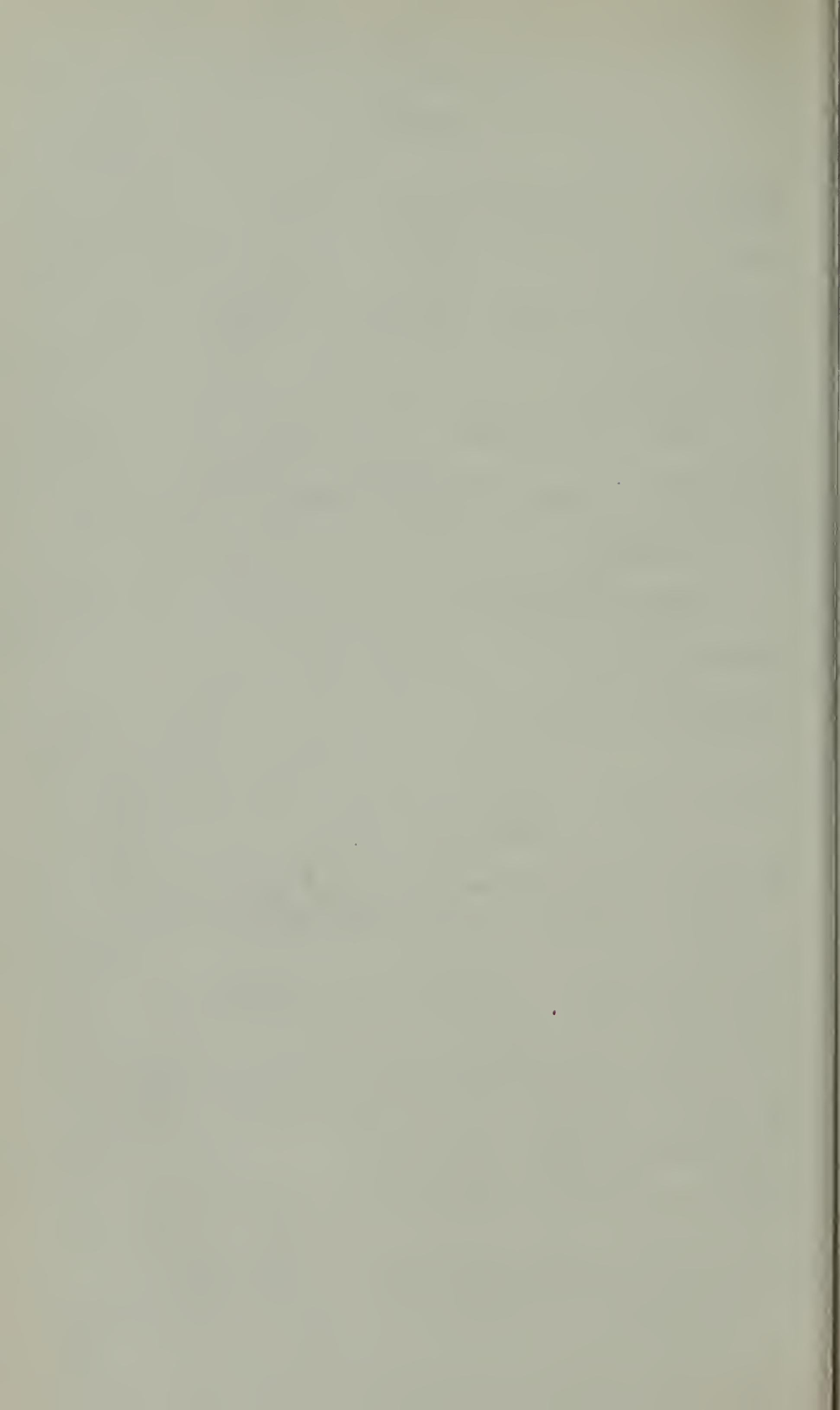

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Appeal from the United States District Court for the District of Oregon.

PRELIMINARY STATEMENT

This is an appeal from a judgment and order of injunction rendered by the District Court for the District of Oregon on July 16, 1952 arising out of an action brought by the Interstate Commerce Commission against the appellant bearing Civil No. 6206 (T.R. pp. 24-27). The complaint and answer in the said action were superseded by a Pre-Trial order dated February 18, 1952 (T.R. pp. 3-16) and the action was tried on

the basis of said order. The jurisdiction of the District Court is based upon Section 222(b) of the Interstate Commerce Act (Title 49 U.S.C.A. Section 322 (b)) on the basis that it is contended by the appellee that the appellant is a carrier subject to the provisions of that Act and has violated the same by operating as such carrier and so continues to operate without procuring a certificate of public convenience and necessity therefor. This Court has jurisdiction of this appeal pursuant to the provisions of Title 28, Section 1291, U.S.C.A. The Pre-Trial order in the court below (T.R. pp. 3-16) sets forth the facts upon which the appellee contends that the court below has jurisdiction of the subject matter of this action.

The appellant is an individual residing at Canby, Oregon, engaged in the business of buying and selling lumber. Appellant receives orders from his customers who are retail dealers primarily in Idaho and purchases the lumber to fill these orders from various mills located in the State of Oregon. Appellant transports the lumber thus purchased by him, to his customers in trucks owned by appellant and operated by his employees. The appellant charges his customers a delivered price for the lumber and no separate statement of transport charge is made nor are bills of lading or other shipping documents issued. It is conceded by appellee that:

> "The absolute and bona fide title to the lumber purchased by the defendant passes to the defendant as soon as he takes delivery at the origin mill site, that he assumes the responsibility for any damage or loss to the same thereafter until delivery." (T.R. p. 8)

It is also admitted that appellant has no lumber yard nor does he carry any stock pile of lumber. The sole question before the court below and this Court is whether the appellant is a "contract carrier by motor vehicle" under the provisions of the Interstate Commerce Act (Sec. 203, Par. 15, I.C.A., Title 49 U.S.C.A., Sec. 303 (15)) or is a "private carrier of property by motor vehicle" (Sec. 203, Par. 17, I.C.A.) (Title 49 U.S. C.A., Sec. 303 (17)).

ASSIGNMENTS OF ERROR

The court below has erred in the following particulars:

I. The District Court was in error in making the findings contained in the first sentence of Finding of Fact III (h) (T.R. p. 21) reading as follows:

> "Taking all of the shipments as a whole, the net sum accruing to the defendant on lumber sales is an amount which compares favorably with transportation charges of duly authorized carriers for similar shipments based upon the published rates per thousand board feet or a mileage basis."

inasmuch as said finding is not sustained by any competent evidence.

II. Even if the portion of the District Court's finding set forth in Specification of Error No. 1 above is correct, the District Court was in error in making the finding contained in paragraph VII of the Findings of Fact (T.R. p. 22).

III. The court below was in error in its Conclusions of Law II, III, IV, V (T.R. pp. 22, 23, 24) in that all of said Conclusions are not based on any findings of fact. Insofar as said Conclusions may be based on findings of fact, said findings are not based upon any substantial or relevant evidence and as a matter of fact are contrary to some of the findings.

IV. The court below was in error in its oral opinion (T.R. p. 17) wherein it held that this case was similar to *Stickle v. Interstate Commerce Commission,* 128 F. (2d) 155, since there are very vital and distinguishing differences between the case at bar and the *Stickle* case, supra.

V. The court below was in error in issuing the judgment and order of injunction appealed from because the plaintiff has not sustained the burden of proof necessary for the issuance of such a judgment and order.

ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR I, II, and III

Summary

An analysis of the transactions upon which the appellee relies shows that in no single transaction is the carrier rate and the difference between appellant's buying and selling delivered price identical and the District Court has found that on individual shipments "there is considerable variation between the tariff rate and the difference between the defendant's buying and selling price" (T.R. p. 21). Averaging the twenty shipments upon which the appellee relies as suggested by the District Court in Finding No. IV (h) (T.R. p. 21) indicates that there is approximately a 6.7% difference between the average of the common carrier tariff rates and the average of the difference between the appellant's buying price and delivered selling price of his lumber. With such a difference shown on an arithmetical basis, it cannot be said that the averages compare favorably. Even if it be held by this Court that a 6.7% difference in the averages is not material it is submitted that a comparison of averages is irrelevant and erroneous in view of the great disparity in the individual transactions.

Body of Argument

This case was in effect tried on a stipulation of facts as both parties agreed upon certain transactions which they agreed were typical of appellant's activities during the period in question (T.R. pp. 15, 35). Such transac-

tions were described in plaintiff's Exhibit 1 which set forth the details of twenty shipments. Defendant submitted an exhibit designated as defendant's Exhibit 1 which summarized the same transactions and two others. By stipulation of the parties it was agreed that the transactions included in both Exhibits which as stated above are identical with the exception of two additional transactions shown in defendant's Exhibit 1, indicate typical transactions (T.R. p. 15). No other evidence of appellant's transactions was submitted and appellee's case must stand or fall on the inferences to be derived from the two exhibits.

For the convenience of this Court there is set forth herein as an Appendix and designated as Appendix A, Columns 3 and 4 of plaintiff's Exhibit 1 together with certain other data hereinafter mentioned, and as Appendix B, defendant's Exhibit 1 together with certain additional data as hereinafter described.

It is respectfully submitted that the key to the case will be found in a careful analysis of plaintiff's Exhibit 1 (Appendix A) and defendant's Exhibit 1 (Appendix B) in the light of the agreed facts in the Pre-Trial Order.

The rationale of the appellee's case is that the difference between what the defendant pays for his lumber at the mill and what he receives for its delivery to his customers closely approximates what a carrier for hire would receive based upon the applicable tariff. While the defendant does not concede that even if that were so in this case, the appellee would be entitled to succeed, it is quite obvious that if the appellee's contention is not

factually correct, the respondent cannot succeed and the appellee has impliedly so admitted. What, therefore, does an analysis of this exhibit show?

1. The first striking fact to be deduced from the exhibit is that in not one of the 22 typical cases described in defendant's Exhibit 1 (Appendix B) is the difference between the defendant's buying price and his selling price exactly equal to what a carrier for hire would receive based upon the applicable tariff.

2. Of the 22 cases in defendant's Exhibit 1 (Appendix B) there were nine instances in which the difference between the defendant's purchase price and his selling price was more than the cost of transportation at the applicable tariff rate and in 13 cases the difference between the purchasing price and selling price was less than the applicable tariff rate.

3. Further analysis of defendant's exhibit indicates that in nine of the typical 22 cases there was a difference between the applicable tariff cost of transportation and the spread between the defendant's buying and selling price of less than ten percent of the carrier cost of transportation, in five cases the difference was between 10 and 19% of the carrier cost of transportation, in 4 cases the difference was between 20 and 29%, in 2 cases the difference was between 30 and 39% and in 2 cases the difference was between 40 and 49%.

4. In summary it should be noted that in almost sixty percent of the typical cases shown in defendant's Exhibit 1 there was a difference of more than 10% between the compensation the defendant would have re-

ceived as a carrier hauling under a carrier tariff and what the appellant actually received as a lumber dealer. For the convenience of the Court, the appellant has indicated on Appendix B the percentage of difference between the compensation the appellant would have received as a carrier hauling under a carrier tariff and what the appellant actually received as a lumber dealer applied to the common carrier charges. Said percentages will be found in the last column of defendant's Exhibit which is designated Appendix B attached to this brief.

5. The plaintiff has also submitted an exhibit to the Court based upon the same typical examples (plaintiff's Exhibit 1) although the appellee has only analyzed 20 of said transactions. Columns 3 and 4 of this exhibit, are headed "Published Tariff Truck Rate" which purports to show the published tariff truck rate and as "Taylor's Net Rate", which is the difference between the appellant's purchasing price and selling price divided by the number of thousand of board feet of lumber involved in the transaction. The appellee attempts to relate the published common carrier rate to the figure indicated as "Taylor's Net Rate". For the convenience of the Court, we have attached to this brief as Appendix A, columns 3 and 4 of plaintiff's Exhibit 1, together with the percentage of difference between each of the items contained in the said columns. An analysis of these percentages will also show that in almost 60% of the cases the percentage of difference exceeds 10% and in some instances is in excess of 40%.

When in almost 60% of the cases the variance between the defendant's net revenue and the common car-

rier rate exceeds 10% there is certainly no factual basis for the District Court's Finding of Fact No. VII (T.R. p. 22).

The truth is that there is no consistent pattern of relationship to carrier rates. The figures as shown in the exhibits are entirely consistent with the appellant's contention that his prices depend upon the ebb and flow of the lumber market and the cost of transportation is merely one factor and in many cases an insignificant factor in determining the price at which he sells his merchandise. *Not only are the figures consistent with appellant's contention, but they are consistent with any other theory in view of the wide variation in many instances between carrier rate and the difference between the appellant's buying and selling price.*

The District Court in Finding IV (h) has found in effect that the position of the appellant with respect to such lack of consistency in individual transactions is correct. However, the court has taken another step in the process of analysis and has found that if the average of the tariff rates involved is compared to the average of the difference between appellant's buying price and delivered selling price, the amounts "compare favorably" (T.R. p 21). This finding is the only one made by the court to support its legal conclusions which in any way might be considered as somewhat inconsistent with the position of the appellant that it is in the lumber business and transports its own lumber to its customers in the ordinary course of business. It is respectfully submitted with reference to such finding:

1) It is factually incorrect.

2) If it is factually correct it is legally irrelevant.

An analysis of the plaintiff's Exhibit 1 (Appendix A) shows that the total of the column entitled "Published Tariff Trucking Rate" is $543.68 and the total of the column headed Taylor's net rate which represents the difference between appellant's buying price at the milling and selling price delivered to his customers is $509.36. Dividing each of said totals by twenty which is the number of transactions set forth in the plaintiff's Exhibit 1 (Appendix A), we find that the average published tariff truck rate is $27.18 and the average of the column entitled Taylor's net rate is $25.46. The difference between the two figures is $1.72. If we divide the figure of $1.72 by $25.46 we find the result to be 6.7%. Thus the difference between the average of the tariff rates and the spread between appellant's buying price at the mill and the delivered price is 6.7% which, it is submitted, is a material difference.

However, even if this Court disagrees with the contention of appellant that the amount of difference is material it is submitted that the use of an average for this purpose is completely irrelevant and erroneous. An average as a statistical measure is an artificial figure in most cases having no significance and does not give very much information about the matter in question. Thus it is quite obvious that if it is desired to learn something about the income of several individuals an average of such incomes is of little significance because if we assume that one person has an income of $50,000 per year,

another of $5,000, and another of $1,000, the average of $18,666 is a figure which tells us nothing. Furthermore there is no legal authority for the use of averages as a means of comparison in this situation. In the *Stickle* case which is the basic authority upon which the appellee and trial judge relied the court found that the difference in each transaction "approximated the amount the carrier who had complied with Part II of the Interstate Commerce Act and has a certificate of necessity would charge for transporting the same lumber." 128 F. (2d) 159. The District Court in this case has made a finding which is directly contrary to the one in the *Stickle* case with respect to each transaction but justifies its position by making use of the artificial device of averaging a group of disparate figures which still results in a substantial difference.

ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR IV and V

Summary

The basic legal authority for appellee's position is *Interstate Commerce Commission v. Stickle,* 128 F. (2d) 155. On the other hand there are three cases in the Federal Courts wherein persons in the position of the appellant have prevailed in similar situations: *Interstate Commerce Commission v. Tank Car Oil Company,* 151 F. (2d) 834; *Interstate Commerce Commission v. Clayton,* 127 F. (2d) 967; *Brooks Transfer Company v. U. S.,* 93 F. Supp. 517, aff. 340 U.S. 934, 71 Sup. Ct. 501. The appellant submits that the facts at bar are not at all comparable to the facts found in the *Stickle* case but are similar to the cases decided in favor of the defendants above cited.

Body of Argument

The question to be decided by the Court in this case is whether the facts in this case at bar bring it within the doctrine of the *Stickle* case or within those cases exemplified by the *Brooks,* the *Clayton,* and the *Tank Car Oil Company* cases above cited.

The basic facts as found by the District Court in the *Stickle* case are as follows (128 F. (2d) 159).

1. That Stickle was "primarily engaged in the transportation of lumber for compensation under individual contracts with its customers; that the amount which

Stickle received from the customer for the lumber and transportation thereof in excess of the amount Stickle pays the mill for the lumber, *approximates* the amount a carrier who has complied with Part II (of the Interstate Commerce Act), and has a certificate of convenience and necessity, would charge for transporting the same lumber; that the transportation by Stickle is not an incident to a commercial enterprise; and that, on the contrary, the buying and selling of lumber is a *means and device* employed by Stickle to enable it to engage in the transportation of lumber as a contract carrier without *complying* with the provision of Part II (of the Interstate Commerce Act) respecting common carriers and contract carriers"

The court therefore held that there was a violation of the Interstate Commerce Act.

It is to be noted in this case that there was a very vigorous and cogent dissenting opinion written by Circuit Judge Huxman so that the decision of the court was very closely divided and was based upon certain findings which are not present in the case at bar. It is also to be noted that the court paid much attention to the fact that the price of lumber paid by Stickle, plus the cost of transportation which would have been charged by a certificated carrier approximated the amount received by Stickle. *That fact is entirely absent in this case* as is shown by the "Argument" in support of Assignments of Error I, II and III in this brief.

It is furthermore noted that the court found that the taking of title by Stickle in that case was a "means and

device" used to evade the purposes of the Interstate Commerce Act. In this case no such question has been raised, and it is conceded that the defendant actually took title to the property and had all the risks incident to such ownership. (See Paragraphs IX and XII, pretrial order, T.R. pp. 7, 8.)

Another very important distinction between the facts of the *Stickle* case and the facts in the case at bar will be found in the statement of facts as set forth in the Circuit Court of Appeals of the Tenth Circuit in 128 Fed. (2d) at page 157. According to the court:

> "Stickle and Company circulated quotations of its prices on various grades, sizes and classes of lumber to numerous prospective purchasers. Until about the time of the trial below, such prices were quoted both on the basis of acceptance of the lumber by purchasers at the mill and on a delivered basis. It set up a schedule of payments to be added to the f.o.b. mill prices for delivery to the customer. The average load approximates 10,300 board feet. Payments to be added to the f.o.b. mill prices were originally listed on a schedule of *'trucking rates'*, the rates varying as to points of delivery. Upon advice of counsel and after an investigation was initiated by the Interstate Commerce Commission, Stickle and Company changed the designation of this schedule to "Schedule of Advance Payments" or "Advances to Driver." (Emphasis supplied)

In the case at bar there was never any distinction made between the f.o.b. prices to defendant's customers or delivered prices. The price to the customer was never divided in any manner and there was never any difference in price as between customers based upon the mileage to be transported solely. The market factors were

the dominant, and in many cases the only differentiating factor in determining the price to the customer. This is shown by the fact that the customer did not know the source of the lumber and agreed to pay the price for the lumber regardless of where the lumber originated. (See paragraphs X and XI of the pre-trial order, T.R. p. 8.) As will be noted in the court's opinion in the *Stickle* case these factual distinctions are very vital.

Two other cases are found in the reports which grant the plaintiff relief in a situation alleged to be similar to the case at bar. The first of these is *Interstate Commerce Commission v. Pickard* in the District Court for the Western District of New York, 42 Fed. Supp. 351. This case involved a situation where the defendant allegedly leased his truck to a furniture manufacturing company which then proceeded to transport its own merchandise to its customers. This case turned upon the fact that as found by the court, the lease was a mere subterfuge and that actually control of the truck and drivers was at all times in the defendant. There was no claim made in that case that the defendant was actually engaged in the furniture business nor was there any evidence to indicate any bona fide sale by the defendant of merchandise owned by it to its customers. The factual situation as will be shown by an analysis of the report was entirely different and the case cannot be used as any authority under the state of facts before the Court.

Another case which is reported wherein the plaintiff has prevailed is in the case of *Interstate Commerce*

Commission v. Jamestown Sterling Corporation, 64 Fed. Supp. 121. This case arose out of the same facts as the *Pickard* case above cited and in that case, as shown by the report at 64 Fed Supp. 123:

> "The transportation by this defendant was incidental to its manufacturing business and the amount of compensation for transportation is identifiable."

It appeared in that case that the identifiable portion of compensation received was the same as that which would have been allowed to a common carrier under the applicable tariff. As stated by the court (64 Fed. Supp. 123):

> "The gravamen of the situation rests in the fixation of charges upon a rate allowed by the Interstate Commerce Commission."

It thus appears that the *Jamestown Sterling* case differs very greatly from the case at bar and cannot be used as authority in this situation.

On the other hand, the cases wherein the defendant has prevailed in this situation would seem to be on all fours with the situation of the case at bar. Thus, this case is very close factually to the case of *Interstate Commerce Commission v. Tank Car Oil Corp.,* supra. In that case the defendant was the owner of motor trucks used by it for transportation of gasoline in connection with its wholesale gasoline business. The District Court for the Northern District of Georgia in the decision in the lower court stated:

> "The plaintiff fails to show by a preponderance of the evidence that as to any transaction there was

> other than a bona fide sale of gasoline f.o.b. the purchaser's station in which the purchaser was buying gasoline and was not concerned in the price or cost of transportation." 60 Fed. Supp. 135.

That is exactly the situation here as is shown by the admitted facts in the Pre-Trial order. The Court of Appeals in affirming the District Court (151 Fed. (2d) 834) distinguished the situation of the defendant in that case from the contract or common carrier situation as follows: (1) The defendant bought the gasoline, paying out its own money at the time of delivery to its trucks. (2) It ran the risk not merely of the loss of freight charges, but the loss of gasoline as well in the event of destruction of its trucks enroute by fire or other casualties. (3) It ran the risk of the purchasers' failure to pay for the gasoline after delivery to purchasers who fail to pay on delivery. (4) It ran the risk of the failure or refusal of purchaser to accept delivery of the gasoline after transportation to the purchaser's place of business, such as might be occasioned by the death of the purchaser, failure of his business or the destruction by fire or other casualties. (5) The appellee assumed all risks that might be occasioned by an act of God prior to the delivery of gasoline to the purchaser, whereas a carrier under the common law would ordinarily not assume such risk or loss to its cargo. (6) The carrier bases his charges ordinarily upon the distance which he hauls the commodity, whereas the appellee bases his charges upon the market price in the community without regard to the source from which it has obtained and transported the gasoline.

In this case all of the distinguishing characteristics mentioned by the Court of Appeals as above quoted appear in the Pre-Trial order and in the testimony. There is no dispute that all of the attributes which the court holds to be important in deciding a similar case are in favor of the appellant in this case, and this Court should follow the reasoning of the Court of Appeals of the Fifth Circuit as set forth above. (Paragraphs IV (3, 5, 6, 9, 11, 12, 13), VIII, IX, X, XI, XII of Admission of Fact, Pre-Trial Order, T.R. pp. 5-8.)

Another case very similar factually to the case at bar is *Interstate Commerce Commission v. Clayton,* supra, cited by the Court of Appeals, Tenth Circuit; the same circuit which decided the *Stickle* case. In this case the defendant was charged with holding himself out as a common or contract carrier of coal. The decision in this case was written by Judge Phillips, who also wrote the opinion in the *Stickle* case. The rationale of Judge Phillips' opinion is contained in 127 Fed. (2d) 967 at 969 wherein the Judge states with respect to the defendant:

> "He has indulged in no subterfuge or design to avoid the requirements of Part II of the Interstate Commerce Act. The cost of the coal and transportation is $5.57 per ton. He sells it for $8.50 per ton. Thus he realized a profit both from the transportation and from the sale of the coal, the margin of profit being large enough to cover both."

So in this case the defendant sells his lumber at a price which in most instances is high enough to cover the cost of transportation plus a reasonable profit for his risk

and other services which he admittedly renders to his customers.

The most recent case on the subject is *Brooks Transportation Co. v. United States,* 93 Fed. Supp. 517, affirmed by U. S. Supreme Court February 26, 1951, 340 U.S. 934 (No. 525), 71 Sup. Ct. Reports p. 501. In that case the District Court which was affirmed by the Supreme Court used the good faith test. The court in that case held that where the purchase and sale was bona fide and title actually passed to the defendant that the defendant was a private carrier and not subject to regulation. The test apparently, according to the court, was whether actual bona fide title passed or only a purported or false title apparently passed to the defendant. The court made much of the quotation from Commissioner Joseph B. Eastman's statement before the Committee on Interstate Commerce, U. S. Senate 99 Fed. Supp. 524. As the court quoted Commissioner Eastman:

> "Well, I was going to say that in instances where the trucker actually buys the product which he transports, that is a bona fide transaction and not merely a device to evade regulation, he would be a private carrier."

Using that test in this case, based upon the admission in paragraph IX (T.R. pp. 7, 8) of the Pre-Trial order, would leave this Court no alternative but to hold that this appellant is a private carrier according to the definition of the statute and therefore is not subject to regulation.

The Interstate Commerce Commission being the plaintiff in this action has the burden of proof. It is sub-

mitted that it has failed to sustain that burden. (See *Interstate Commerce Commission v. Tank Car Oil Corp.*, supra.)

FOR THE FOREGOING REASONS THE JUDGMENT AND ORDER APPEALED FROM SHOULD BE REVERSED AND THE COMPLAINT HEREIN DISMISSED.

Respectfully submitted,

HICKSON & DENT,
SEYMOUR L. COBLENS,
Attorneys for Appellant.

APPENDICES

APPENDIX A

Published Tariff Truck Rate	Taylor's Net Rate	Percentage of Difference Between Published Tariff Truck Rate as Shown on Plaintiff's Exhibit I
27.77	24.50	—8
25.92	36.91	+42
29.15	26.10	—10
25.01	27.55	+9
26.82	21.52	—21
35.13	25.23	—28
35.13	23.78	—31
26.33	26.30	—1/10
20.87	21.60	+3
30.99	25.30	—18
19.03	19.79	+4
21.79	22.05	+01
29.15	25.48	—12
25.01	24.32	—5
20.41	24.50	+16
23.63	25.48	+7
20.87	26.72	+28
25.87	15.10	—40
35.13	26.95	—23

EXHIBIT, showing Mileage, Motor Carrier and Rail Rates, Motor Carrier Freight Charges Net Cost, Net Cost plus Motor Carrier Freight charges, Net Cost plus 23¢ per traveled mile and Net selling price covering shipments of Lumber and Plywood moving from points in Oregon to points in Idaho and Utah. Also showing profit and loss based on motor carrier charges and/or on 23¢ per traveled mile. All rates are in cents per 1000 feet board measure except those bearing symbol ∅ which are in cents per one hundred pounds and except as otherwise noted rates named will be found in Item No. 2850, Willamette Tariff Bureau, Inc., Agent, Tariff No. 5, M.F.-I.C.C. No. 2

Shipper	Invoice Date	Invoice No.	From	To	Mileage	Truck Rate	Rail Rate	Cost of Transportation @ 23¢ per traveled mile	Freight Charges via Motor Carrier	Net Cost	Net Cost plus Motor Carrier Freight	Net Cost plus 23¢ per traveled mile	Net selling price	Difference between net cost plus Mtr. Carrier Frt. Chgs. and selling price: Profit	Loss	Difference between net cost plus 23¢ per traveled mile and selling price: Profit	Loss	Percentage of Difference
Lumber Products	10/10/50	101	Eugene, Ore.	Gooding, Ida.	[1] 553	2777	82	$254.58	$438.57	$1144.99	$1583.56	$1399.37	$1531.92		51.64	$132.55		- 12
Caldwell Lumber Co.	7/6/51	107-851	Cottage Grove, Ore.	Mt. Home, Ida.	[2] 514	2592	82	236.44	414.88	519.40	934.28	755.84	1110.00	$175.72		354.16		+ 42
Bradford Lumber Co.	7/18/50	-	Springfield, Ore.	Twin Falls, Ida.	[2] 586	2915	82	269.56	496.66	868.44	1365.10	1138.00	1288.96		$ 76.14	150.96		- 15
Young Lumber Co.	9/18/50	3632	Eugene, Ore.	Mt. Home, Ida.	[3] 492	2501	82	226.32	409.01	893.28	1302.29	1119.60	1343.89	41.60		224.29		+ 10
Lowes Lumber Co.	7/20/51	-	Molalla, Ore.	Mt. Home, Ida.	[11] 531	2682	82	244.26	409.36	836.07	1245.43	1080.33	1242.90		2.53	162.57		-1/2
Pope & Talbot	11/24/50	OLW44	Oakridge, Ore.	Blackfoot, Ida.	[4] 712	3513	82	327.52	642.91	1165.78	1808.69	1493.30	1627.60		181.09	134.30		+ 28
Pope & Talbot	9/30/50	1757	Oakridge, Ore.	Blackfoot, Ida.	[4] 712	3513	82	327.52	622.57	1491.24	2113.81	1818.76	1912.60		201.21	93.84		+ 33
Pope & Talbot	9/16/50	1613	Oakridge, Ore.	Ogden, Utah	[5] 830	4019)	82	(381.80	361.71)	916.18)	1277.89)		1207.74)					
Campbell-McLean	9/15/50	97	Eugene, Ore.	Ogden, Utah	[9] 787	∅218)	82	(	510.12)	1862.00)	2372.12)	3159.98	/2288.00)		154.27	335.76		+ 30
Acme Lumber Co.	6/16/50	1802	Estacada, Ore.	Boise, Ida.	[6] 468	2633	69	215.28	320.62	775.68	1096.30	990.96	1095.93		.37	104.34		-1/10
Freres Frank Lumber Co.	8/22/50	2319	Lyons, Ore.	Nampa, Ida.	[7] 409	2087	82	188.14	339.49	1275.34	1614.83	1463.48	1626.70	11.87		163.22		+ 6
Idanha Lumber Co.	11/1/50	2457	Idanha, Ore.	Arco, Ida.	[8] 621	3099	no rail	284.66	554,81	1140.43	1695.24	1425.09	1593.36		91,88	168.27		- 16
Campbell-McLean	11/1/50	599	Eugene, Ore.	Arco, Ida.	[9] 621	∅127	82	284.66	482.60	2807.90	3290.50	3092.56	/3286.40		4.10	183.84		- 01

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Shipper	Invoice Date	Invoice No.	From	To	Mileage	Truck Rate	Rail Rate	Cost of Transportation @ 23¢ per traveled mile	Freight Charges via Motor Carrier	Net Cost	Net Cost plus Motor Carrier Freight	Net Cost plus 23¢ per traveled mile	Net selling price	Difference between net cost plus Mtr. Carrier Frt. Chgs. and selling price: Profit	Loss	Difference between net cost plus 23¢ per traveled mile and selling price: Profit	Loss	Percentage of Difference
Idanha Lumber Co.	10/31/50	2278	Idanha, Ore.	Caldwell, Ida.	[10] 367	1903	no rail	$168.82	$321.85	$1227.31	$1549.16	$1396.13	$1562.07	$ 12.91		$165.94		+ 4
Fall Creek Lumber Co.	11/12/47	-	Fall Creek, Ore.	Caldwell, Ida.	[3] 426	2179	82	195.96	440.83	1239.15	1679.98	1435.11	1685.24	5.26		250.13		+ 1
Fall Creek Lumber Co.	3/5/48	-	Fall Creek, Ore.	Buhl, Ida.	[3] 586	2915	82	269.56	510.62	1133.00	1643.62	1402.56	1579.33		$ 64.29	176.77		- 12
Blue River Lumber Co.	6/8/49	1790	Eugene, Ore.	Mt. Home, Ida.	[3] 492	2501	82	226.32	500.83	902.18	1403.01	1128.50	1389.15		13.86	260.65		- 2
Al Clemente Lumber Co.	6/22/49	-	Eugene, Ore.	Weiser, Ida.	[3] 398	2041	82	183.01	367.38	617.40	984.78	800.41	1058.40	73.62		257.99		+ 20
Lorane Valley Lumber Co.	7/6/49	693	Cottage Grove, Ore.	Boise, Ida.	[2] 469	2363	82	215.74	410.73	817.65	1238.38	1033.39	1260.53	22.15		227.14		+ 5
Mt. Vernon Lumber Co.	8/15/49	417	Springfield, Ore.	Homedale, Ida.	[3] 410	2087	82	188.60	327.28	869.40	1196.68	1058.00	1288.49	91.81		230.49		+ 27
Fall Creek Lumber Co.	1/12/51	-	Fall Creek, Ore.	Boise, Ida.	[3] 455	2587	82	209.30	347.68	1041.60	1389.28	1250.90	1243.54		145.74		$7.36	- 41
Pope & Talbot	3/20/51	-	Oakridge, Ore.	Blackfoot, Ida.	[4] 712	3513	82	327.52	591.20	824.62	1415.82	1152.14	1278.17		137.65	126.03		- 23
J. B. Brown	4/3/51	-	Cottage Grove, Ore.	Blackfoot, Ida.	[2] 757	3967	82	348.12	476.04	870.24	1346.28	1218.36	1352.40	6.12		134.04		+ 2

[1] U.S. Highways 28, 20, 30 and Idaho State Highway 24
[2] U.S. Highways 99, 28, 20 and 30
[3] U.S. Highways 28, 20 and 30
[4] Ore. State Highway 58 and U.S. Highwaye 97, 20 and 30
[5] Ore. State Highway 58 and U.S. Highways 97, 20 and 30
[6] Ore. State Highway 211 and 50, and U.S. Highways 97, 20 and 30
[7] Ore. State Highway 222, and U.S. Highway 20
[8] Ore. State Highway 222, U.S. Highway 20 and 30, and Idaho State Highway 27
[9] Rate as named in Pacific Inland Tariff Bureau Tariff No. 10-A, M.F.-I.C.C. No. 6 and Tariff No. 28, M.F.-I.C.C. No. 12.
[10] Ore. State Highway 222, and U.S. Highways 20 and 30
[11] Ore. State Highway 215, and U.S. Highways 20 and 30
/ Plywood

No. 13512

In the United States Court of Appeals for the Ninth Circuit

CLAUDE A. TAYLOR, Appellant,
vs.
INTERSTATE COMMERCE COMMISSION,
Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

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1. The compensation factor as argued in appellant's assignments of Error I, II, and III is not based upon reliable evidence nor is it controlling.

C. The cases relied upon by appellant in argument in support of assignments of Error IV and V are distinguishable from the case at bar and they aptly re-define the issue here involved........ 6

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In the United States Court of Appeals for the Ninth Circuit

No. 13512

CLAUDE A. TAYLOR, Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon

I

PRELIMINARY STATEMENT

By Findings of Fact and Conclusions of Law made and entered on the 16th day of July, 1952, the District Court found that appellant was engaging in the business of a contract carrier in the transportation of lumber by Motor Vehicle in interstate commerce on public highways, for compensation, without there being then and there in force, with respect to said defendant, a permit issued by the Interstate Commerce Commission authorizing said defendant to engage in such business; that said acts of defendant were

and are in violation of Sections 209(a) and 222(a), Part II of the Interstate Commerce Act.

Pursuant thereto the court entered a Judgment and Order for Injunction enjoining and restraining the defendant from further engaging in the described operations until such time as proper authority was issued by the Interstate Commerce Commission.

The order further provided that in event of appeal within 15 days from the date of entry thereof, the injunction shall be stayed during the pendence of such appeal.

Defendant has duly appealed from this Judgment and Order of Injunction.

II

JURISDICTION

Jurisdiction of the District Court is invoked under Sections 204(a) and 222(b), Part II of the Interstate Commerce Act. (Title 49, U.S.C. 304(a) and 322(b).) Jurisdiction of the Circuit Court of Appeals is invoked under the provisions of Title 28, U.S. Code, Section 1291.

III

STATUTES AND REGULATIONS INVOLVED

See Appendix I as follows:

Item 1—Section 203(a) (49 USC 303(a))
Item 2—Section 206(a) (49 USC 306(a))
Item 3—Section 209(a) (49 USC 309(a))

IV

STATEMENT OF THE CASE

The case was submitted to the District Court substantially upon a Pre-Trial order dated February 18, 1952 (Tr. 3-16). However, appellant's statement (app. Br. 1-2) that "the case was tried on the basis of said order" is not wholly correct. As to disputed contentions, contained in the Pre-Trial order, trial was had and testimony of witnesses for both appellant and appellee was adduced.

A summary of the facts as contained in the Pre-Trial Order and from the testimony of record is: The appellant is an individual residing at Canby, Oregon. He owns and operates 3 flat-bed truck-trailer units of motor vehicle equipment. In 1943 he was issued a permit by the Public Utilities Commission of Oregon authorizing the transportation of logs, poles, piling and lumber within the state of Oregon (Tr. 4). He still holds this permit and in 1950 he grossed a transportation revenue of $14,335.68 for hauling lumber and related products in intrastate commerce. (Tr. 7). Between March, 1947, and October, 1949, he owned and operated the Canby-Aurora Truck Service, an Interstate carrier, under a certificate issued by the Interstate Commerce Commission. (Tr. 4). Beginning 1947, and continuing at the present time, appellant also engaged in "buying" lumber in Oregon, from wholesale lumber pro-

ducers, transporting it to Idaho in his own vehicles, and "selling" it to retail lumber dealers.

Appellant does not maintain a retail or wholesale lumber yard or storage facility of any nature or an inventory or stockpile of lumber of any kind or at any place. (Tr. 5, 472). His basic and principal investment is in his truck equipment and his only payroll is his truck drivers. (Tr. 19, 45). Appellant's only income is derived from and through the operation of his trucks.

Substantially all lumber is sold, to two Idaho dealers, in truckload lots, but not one stick of lumber is purchased by appellant until and unless he receives an order from a dealer. (Tr. 20, 51). Each individual purchase of lumber is made to fill a specific order. There is a tacit understanding between the appellant and the dealer-purchaser that appellant is to perform the transportation and make delivery by use of his own trucks direct from the mill to the dealer. (Tr. 20, 49, 50).

Appellant quotes a selling price upon receiving an order. He is free to buy the lumber from any mill he chooses. Selling price is based upon cost, plus a calculated profit. No part of the difference between cost price and sale price is identified as transportation charges but, purportedly, some part of this figure is based upon cost of operation. (Tr. 20). In 1950 appellant made 90 "purchases" and 90 correspond-

ing "sales" resulting in a net gross profit of $27,653.00. (Tr. 21).

The representative shipments listed on plaintiff's Exhibit I, (Appendix II) for the convenience of this court, have been rearranged on a progressive mileage (distance) basis. The miles shown were taken from data shown on Defendant's Exhibit I, (app. Br., Appendix B). Appellee's exhibit (Appendix II) shows two things: (1) a comparison between published common carrier rates and appellant's net revenue translated in terms of rates (Tr. 35), and (2) the progressive increase of appellant's "profit" (in terms of rates) in direct relationship to distance traveled.

Appellant does not hold any authority, certificate or permit, from the Interstate Commerce Commission authorizing operations, of any kind, in interstate commerce.

V

QUESTION PRESENTED

Is the defendant engaged in the business of transporting lumber in interstate commerce for compensation as a common or contract carrier and subject to the regulatory provisions of Part II of the Interstate Commerce Act, or are the operations of the defendant in transporting lumber in interstate commerce those of a private carrier and as such not subject to said provisions of the Act?

VI

SUMMARY OF ARGUMENT

A. The conclusions of Law by the District Court are correct and are supported by prevailing authority.

1. The Interstate Commerce Act is a remedial statute and should be liberally construed to effect its evident purpose.

2. The Interstate Commerce Commission has determined that the primary business of the transporter is the controlling test in similar cases.

3. The courts have followed and applied the "primary business" test in the determination of the issue.

B. The application of the "primary business" doctrine is a factual process and must be predicated upon a consideration of every related factor involved. No single test factor is exclusive or determinative.

1. The compensation factor as argued in appellant's assignments of Error I, II, and III is not based upon reliable evidence nor is it controlling.

C. The cases relied upon by appellant in argument in support of assignments of Error IV and V are distinguishable from the case at bar and they aptly re-define the issue here involved.

VII

AUTHORITIES AND ARGUMENT

A. The conclusions of Law by the District Court are proper and supported by prevailing authority.

> 1. The legislation before the court (Part II, Interstate Commerce Act) is remedial and should be liberally construed to effect its evident purpose.

The determination of whether certain forms of transportation are for-hire carriage as a common or contract carrier or private carriage, has been a matter presented before both the Interstate Commerce Commission and the courts in numerous instances since the adoption of Part II of the Interstate Commerce Act.

In making a determination of the full nature of the transportation here considered, the purpose of the law as defined by the Transportation Act, 1940, is herewith restated:

> "It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services with-

> out unjust discriminations, undue preference or advantages or unfair or destructive competitive prices; * * * to the end of developing, coordinating and preserving a national transportation system, * * * adequate to meet the needs of the commerce of the United States * * * and of the national defense."

In this respect, in *Interstate Commerce Commission* v. *A. W. Stickle & Co.,* 41 F. Supp. 268, Aff. 128 F. (2d) 155, with reference to the national transportation policy as above set forth, the court stated:

> "In addition the court should have in mind the fact that this legislation is remedial and should be liberally interpreted to effect its evident purpose and that exception from the operation of the Act should be limited to effect the remedy intended * * *. Use may also be made of the decisions of the Interstate Commerce Commission as applied to analagous factual situations. The decisions, while not binding on the court, in the absence of decisions by the court, are persuasive and entitled to great weight."

and further the court said:

> "It must be assumed the Congress in defining a private carrier did not attempt thereby to afford a means or device whereby one might evade the provisions applicable to common or contract carriers."

And, further, in *Interstate Commerce Commission* v. *Pickard et al.,* 42 F. Supp. 351 (1941), the court having before it the question of private carriage, said:

"The methods herein employed could result in unjust discriminations, undue profits or advantages as between the partnership and other carriers. Of course a private carrier can fix its own rates of transportation, but the effect of the acts should be considered in connection with the proofs going to show the commission of the Acts."

In *Georgia Truck System, Inc.,* v. *Interstate Commerce Commerce,* 123 F. (2nd) 210, 212, the court observed:

"It is sufficient for us to say the invoked statute is a highly remedial one, that its terms are broadly comprehensive enough to bring within them all of those who no matter what form they use, *are in substance engaged in the business of interstate or foreign transportation of property on the public highways for hire.*" (Underscoring supplied.)

2. The Interstate Commerce Commission has determined that the "primary business of the transporter" is the controlling test.

The issues of for hire versus private carriage is one which has been considered by the Commission numerous times in various cases. Among the earliest was *Carpenter Common Carrier Application,* 2 M.C.C. 85. Carpenter owned and operated one small truck. His regular occupation was the hauling of milk from farm to creamery. His only interstate operations consisted of the transportation of coal from two collieries in an adjacent state directly to consumers. Upon receipt of an order for coal, he would

proceed to the mine, purchase the coal with his own funds, transport it to destination, and deliver it to the customers for a fixed amount in excess of the cost at the mine. Not withstanding his ownership of the coal while in transit and the other facts suggesting private carriage, it was found that in such operation he was "engaged primarily in the transportation of property" for compensation, and, since his transportation services were available to any who sought them, he was found to be a common carrier by motor vehicle.

This decision has been followed by many others involving operations of this character, a few of which are as follows: *Corner's Service, Inc., Contract Carrier Application,* 23 M.C.C. 803; *Starr Freight Service, Inc., Contract Carrier Application,* 16 M.C.C. 209; *Forister Common Carrier Application,* 10 M.C.C. 461; *Schulz Common Carrier Application,* 10 M.C.C. 453; *Johnson Common Carrier Application,* 10 M.C.C. 4; and *Moeller Common Carrier Application,* 6 M.C.C. 719.

In 1942 the Commission, with a view of clarifying and further identifying the status of common carriers and contract carriers as distinguished from private carriers, reviewed its own past determinations and restated certain test factors. The restatement was made in *L. A. Woitisheck Common Carrier Application,* 42 M.C.C. 193 (1943). In this case the

Commission held the applicant to be a private carrier. However in its determination it stated:

> "Thus we have a line of cases wherein persons engaged primarily in the supplying of transportation for compensation and with a purpose to profit from the transportation would have been found to be a carrier for-hire, notwithstanding that each was the owner of the goods transported while in transit and was transporting them for the purpose of sale and perhaps also had some other of the characteristics of a merchandiser. On the other hand, we have a line of cases in which persons who are primarily engaged in some manufacturing or merchandising undertaking have been found not to be carriers for-hire, though an incident to their primary business and without a purpose to profit therefrom, they perform certain transportation for which they receive compensation which is identifiable as compensation for transportation and in some instances included a profit. In other words, the finding for or against a carrier for-hire status in each such case has turned upon the sole question of fact as to the primary business of the transporter."

> "After careful study, it seems clear to us that the transportation 'for compensation' contemplated by both the contract and common definitions, as distinguished from the transportation 'for the purpose of sale, lease, rent, bailment, or in furtherance of any commercial enterprise' contemplated by the private carrier definition, is transportation which is supplied with a purpose to profit from the effort as distinguished from a purpose merely to make good or recover the cost of transportation furnished in the furtherance of some other primary business or transaction."

The Commission itself has followed implicitly the criteria pronounced in the Woitisheck case in its later decisions. An analysis of two subsequent Commission cases is pertinent hereto. *Lenoir Chair Company Contract Carrier Application,* 48 M.C.C. 259, and *Schenley Distillers Corporation Contract Carrier Application,* 48 M.C.C. 403 (1948). These cases not only re-define the "primary business doctrine" and the related factor of "compensation" as laid down in the Woitisheck case, but they clarify the issue. The full Commission examined these applications jointly on rehearing, 51 M.C.C. 65 - 1949. Ultimately the Commission's determinations in these cases were upheld by the United States Supreme Court, which court decision will hereinafter be referred to.

Lenoir was and is a furniture manufacturer. Its total production approximates $3,000,000.00 per year. Between 15% and 20% of this output is transported to customers by its own trucks, the balance being transported by rail and motor common carriers. *All sales are made F.O.B. its factory.* When transportation was performed in its own vehicles, it added an identifiable transportation charge which was comparable to that established by for-hire carriers. The records showed, though, that Lenoir actually lost money on the operation of its own vehicles. The Commission held that Lenoir was primarily engaged in the manufacture of furniture, and hence held it to be a private

carrier, but in determining the issue, it stated:

"The foregoing facts clearly establish that applicant's primary business is that of the manufacture of furniture. Although it does charge an identifiable figure for the transportation service provided by it when deliveries are made in its own vehicles and although this amount is comparable to a common carrier rate for the same service, we do not believe that these facts standing alone warrant a conclusion that applicant thereby is established as a carrier for-hire. We think it evident that applicant is not engaged in transportation with a purpose of profiting therefrom in the same sense as is a carrier for-hire. In reaching this conclusion we are not particularly impressed by the fact that it has been shown that such operations during recent specified periods were conducted at a loss. Applicant uses its own vehicles for the transportation of only 15 to 20 percent of its entire production. It has charged a rate comparable to that of common carriers not specifically because such a rate allows a for-hire carrier a measure of profit, but for the reason that such a procedure provides the same delivery price to its customers in all instances regardless of what carrier performs the transportation, and, perhaps, also because such a rate is readily obtainable from the tariffs of common carriers."

"* * * We conclude that applicant is primarily engaged in the manufacture of furniture, that its motor carrier operations are a bona fide incident to and in furtherance of its primary business, and that the transportation performed by it is not performed with a purpose to profit from the transportation as such."

Schenley is engaged in the production and distribution of alcoholic liquors and the manufacture of accessories used in such enterprise. The record discloses that only approximately 0.05% of all shipments are transported on Schenley's own motor vehicles. The balance moves by rail and motor common carriers. *The selling price of liquor is F.O.B. point of origin.* When transportation was performed by its own vehicles, a sum roughly equivalent to the rail rate was added to the selling price. The Commission held that Schenley was primarily engaged in a non-carrier business enterprise and hence held it to be a private carrier, and in its determination stated:

> "The primary business of the transporter is the basic test, not the fact that some compensation identifiable as such or hidden is collected. Compensation for transportation may be collected by a private carrier as such or indirectly and it may even include an incidental element of profit provided the transportation is not 'for compensation' in the sense that it is performed with a purpose or aim to profit as a carrier. To be a common or contract carrier by motor vehicle, there must be transportation 'for compensation' by one so engaged as a business and with an 'intent' or 'purpose' to profit from the compensation."

> "Clearly, applicant's primary business is the sale and distribution of alcoholic liquors. The out-bound transportation of packaged liquors, of which applicant is at the time the owner, is for the purpose of sale and in furtherance of its primary business. True, the delivered price of packaged liquors transported by appli-

cant to its customers is the selling price at point of origin plus a sum comparable to the rail rate therefrom to destination. However, this is to provide the same delivered price to its customers regardless of the method of transportation utilized and not with any purpose or aim to profit from the transportation as such."

3. The courts have accepted the "primary business" doctrine as a proper test in the determination of the issue.

The Commission decisions in the Lenoir and Schenley cases became subject to judicial review in *Brooks Transportation Company, et al.,* v. *United States, et al.,* 93 F. Supp. 517, affirmed 340 U.S. 925. The complainants in this case were motor common carriers for-hire. They took exception to the Commission's holding with respect to the compensation factor, contending objectively that the "rates" as collected by Schenley and Lenoir, beging comparable to established common carrier rates, necessarily provided an element of profit and hence the transportation activities of these business concerns were repugnant and contrary to private carriage and fell within the definition of common or contract carriage "for compensation". The court in upholding the Commission's views said:

"The Commission, in deciding that Lenoir and Schenley were private carriers, as opposed to contract carriers or common carriers, applied what is known as the *primary business test.* In other words, if it is es-

tablished that the primary business of a concern is the manufacture or sale of goods which the owner transports in furtherance of that business and the transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item. The Commission has so held consistently in its interpretation of the statutory provisions regulating the various categories of motor carriers. See *Congoleum-Nairn, Inc., Common Carrier Application,* 2 M.C.C. 237; *D. L. Wartena, Inc., Common Carrier Application,* 4 M.C.C. 619; *Swanson Contract Carrier Application,* 12 M.C.C. 416; *Murphy Common Carrier Application,* 21 M.C.C. 54; *Dull Contract Carrier Application,* 32 M.C.C. 158; and *Woitisheck Common Carrier Application,* 42 M.C.C. 193.

And it said further;

"We deem it not inappropriate to consider what might be called the economic approach to the problem before us in the light of what might be called the felt needs and the best interests of the interstate carriers of goods by motor vehicle. In our considered judgment such an approach strongly favors the primary business test as against the compensation test. And the problem before us is primarily one that should be solved not by theoretical abstracts or by excursions into juristic semantics but rather by practical common sense. Just what type of measure of compensation was intended by Congress to bring the carriage within Section 203(a) (14) or (15) is best ascertained by the primary busi-

> ness test. And, in the application of this test, the motive to profit by the carriage and the relation of the carriage to the business involved are important elements."

The first and leading court decision involving this issue was *Interstate Commerce Commission* v. *A. W. Stickle.* In this case the facts are practically similar to the case now before the court. Briefly, the facts in the Stickle case were:

A. W. Stickle & Co. was the lessee of certain lumber storage facilities and ostensibly engaged as a dealer in lumber but carried very little stock. Stickle did maintain some semblence of a lumber stockpile. Less than 5% of its sales were filled from stored stock, and not infrequently its storage facilities were not used for two weeks or more. Generally, *upon receipt of an order,* it arranged to purchase the lumber required from certain mills to fill that order. There was no contact between the customer (buyer) and the lumber mill (seller). The lumber was hauled on Stickle's own trucks, which substantially was its only investment, and its drivers were its only payroll. The amount Stickle received for the lumber was in excess of what he paid for it. The difference consisted of (1) a transportation charge which was materially less than the transportation charges of duly authorized carriers, and (2) a commission. However, the net revenue (selling price over cost) approximated the published rates of regulated carriers. Approx-

imately 95% of Stickle's income was derived from this source of revenue.

In its findings the court said:

> "The trial court found in substance that Stickle & Co. is primarily engaged in the transportation of lumber for compensation under individual contracts with its customers, that the amount which Stickle & Co. receives from the customer for the lumber and the transportation thereof, in excess of the amount Stickle & Co. pays the mill for the lumber, approximates the amount a carrier who has complied with Part II (of the Interstate Commerce Act), and has a certificate of convenience and necessity would charge for transporting the same lumber; that the transportation by Stickle & Co. is not an incident to a commercial enterprise; and that, on the contrary the buying and selling of lumber is a means and device employed by Stickle & Co. to enable it to engage in the transportation of lumber as a contract carrier without complying with the provisions of Part II (supra) respecting common carriers and contract carriers."

> "We think it unimportant that the technical title to the lumber remains in Stickle & Co. until the transportation is completed and the lumber delivered to the customer. Prior to the transportation of the lumber and normally before the lumber has been purchased by Stickle & Co., it has entered into a contract to sell the lumber to a customer and to transport it to his yard * * * The transportation is not merely incidental to the business of selling lumber. It is a major enterprise in and of itself. * * * A carrier may not avoid the requirements of Part II (supra) by subterfuge or device, or by posing

> as a private carrier when, in substance and reality he has engaged under individual contracts in transportation by motor vehicle of property in interstate commerce for compensation. Ownership of the commodity transported is not the sole test. The primary test * * * is transportation for compensation."

B. The application of the primary business doctrine is a factual process and must be predicated upon the consideration of every related factor. No single test factor is exclusive or determinative.

1. The compensation factor as argued in Appellant's Assignment of Error I, II, and III is not based upon reliable evidence nor is it controlling.

The appellant assigns as error the District Court's Finding IV with reference to the comparison between the net sum accruing to appellant on lumber sales as compared with transportation charges of authorized carriers. Appellant states that the court erred "by making use of the artificial devise of averaging a group of disparate figures which still results in a substantial difference" (App. Br. 11). In order to empasize "disparate figures" appellant has resorted to a percentage computation based upon figures contained on Defendant's Exhibit 1 (Appendix B). It is to be noted that the percentage is based upon figures in a "Profit and Loss" column described as "Difference between net cost plus Mtr. Carrier Frt. Charges and selling price" as compared with figures in a "Profit and Loss" column

described as "Difference between net cost plus 23c per traveled mile and selling price." The percentages based upon this comparison are valueless. The record shows a total failure of evidence to support appellant's contention that his transportation costs amounted to 23c per traveled mile. (Tr. 52, 53, 54, 55). On the other the record discloses a cost factor based upon comparable transportation services far in excess of a 23c figure. (Tr. 37, 38, 39). If any "artificial devise" has been employed in this case certainly it cannot be charged to the District Court in view of its statement (Tr. 56) "I am not impressed with the 23c per mile statement. Go to something else."

In the Pre-Trial Order (para. VII) (Tr. 10) appellee contended that the sum of the difference between cost price and selling price of lumber "compares favorably" with transportation charges of duly authorized carriers. At no time has appellee contended that said sum "closely approximates" or bears a "fixed relationship" to common carrier charges. And most certainly the appellee has never contended that this factor is the "rationale" of its whole case.

Appellee admits and the District Court recognized a variance of revenue with respect to individual shipments. The fluctuation in the net return on the transportation of various shipments by appellant is no different than that generally experienced by common carriers subject to the

Interstate Commerce Act. No carrier will earn the same return on a series of identical shipments over a given period even though the rate is the same on all of them. The net profit on each individual shipment in a series of identical shipments will vary considerably caused by a variety of factors, such as performance by different employees, weather conditions, shippers facilities for loading, consignees facilities for unloading and other similar details. One of the benefits which the regulation of rates extends to the shipping public is that the shipper can depend upon a stabilized transportation factor in merchandising his goods and the carrier must absorb or assume the fluctuations in costs between handling individual shipments—to take the bitter with the sweet.

The record adequately supports the Finding IV (L) of the District Court that "Taking all of the shipments as a whole, the net sum accruing to the defendant on lumber sales is an amount that *compares favorably* with transportation charges of duly authorized carriers for similar shipments * * *". Appellant's own analysis of Appendix II (Plaintiff's Exhibit I) discloses an over-all variance of 6.7%. The evidence of record discloses (Tr. 59):

> Q. (by the court) and usually you are pretty safe when you are quoting a price, you can quote it at a price you think you can make a profit on, isn't that right?

A. (by appellant) That is right. Sometimes, however, I haven't been too safe.

Appellant attempts to distinguish the Stickle case (supra) from the case at bar. Suffice it to say, that court did not base its decision upon the compensation factor solely. It observed the whole factual situation. Those who operate in evasion of regulation adopt methods designed to accomplish the end. Some learn by the experience of others. It is admitted that appellant's "profit" is not identified as a transportation charge. We fail to find legal significance in the difference of meaning between "approximate" and "compares favorably" with respect to the compensation factor. Nor are we alarmed because the District Court did not find that a "design" resided in appellant's mind when he took title to lumber under the circumstances here considered.

C. The cases relied upon by appellant are distinguishable from the case at bar and they aptly re-define the issue involved here.

In *Interstate Commerce Commission v. Pickard et al.*, 42 F. Supp. 351, it is admitted that the issue there involved a separate and dissimilar state of facts. Appellee cited the case (supra) only as authority for the proposition that the intendments of the Interstate Commerce Act can be circumvented by subterfuge and it requires vigilant inquiry

under such circumstances to effectuate the purposes of the Act.

In *Interstate Commerce Commission* v. *Jamestown Sterling Corporation,* 64 F. Supp. 121, the court in upholding a Commission determination, recognized a duality of functions. This case holds that a furniture manufacturer in the transportation of its own merchandise can function as a common carrier as to those shipments where an identifiable and measurable transportation charge is assessed and collected which bears no relation to the out of pocket costs of transportation.

Appellant further states that there are three cases in the Federal courts, one of which was affirmed by the Supreme Court of the United States, wherein the defendants have prevailed in similar situations. These three cases were cited as follows: *Interstate Commerce Commission* v. *Tank Car Oil Company,* 151 Fed. 2d 834, affirming 60 Fed. Supp. 133; *Interstate Commerce Commission* v. *Clayton,* 127 Fed. 2d 969; *Brooks Transportation Co.* v. *United States,* 93 Fed. Supp. 517, affirmed by Supreme Court February 26, 1951, 71 Sup. Ct. 501. An analysis of the facts in these three cases will indicate to the court here either that the decisions were based upon a dis-similarity of facts or that the issue involved was not of the same character.

In the Tank Car Oil Company case the dis-similarity with the instant case is immediately discernible in the first

few lines of the statement of facts as found by the court, viz:

> "It (defendant) owns and operates 12 filling stations for the retail sale of gasoline, oil, and kerosene; it has furnished all pumps, tanks and other equipment in 4 additional filling stations under contracts which require the operators to purchase gasoline only from the appellee (defendant)."

The issue in the Tank Car case was predicated upon the fact that defendant took orders for and supplied gasoline to other filling stations at wholesale prices and transported the gasoline to the purchasers in its own vehicles in like manner as it transported its own gasoline. The court held the defendant to be engaged in the primary business of distribution of petroleum products and that sales to others was an integrated part of its primary undertaking. The plaintiff has no quarrel with the decision in this case. We feel that it represents a situation which is completely contrary to the facts in the instant case and represents clearly the contention of the plaintiff, that is the application of the "primary business test" as applied to cases of this kind.

The *Clayton case* is obviously distinguishable from the case at bar. In holding that Clayton was performing a private carrier service, the court found the following facts: Clayton maintained a coal yard at his home in Ucon, Idaho, and sold coal therefrom to the public generally in Ucon

and nearby neighboring towns. He never purchased coal to fill any specific or particular prior orders. There was no difference in the selling price delivered at Ucon or at the nearby towns, although delivery to the other towns entailed a longer haul. He did not haul coal for compensation under any individual contract or arrangement.

Again the Clayton case represents clearly the position of the appellee that the size of the business is immaterial, but in the determination of the question an identifiable primary business must be established and then if transportation is performed in furtherance of that commercial enterprise, a private carrier status recognition is justifiable.

The facts in the instant case are obviously contrary to the facts in the Clayton case. Succinctly stated, the appellant in this case "engaged in the lumber business" only after he had entered into an individual contract to transport a specific order of lumber—a contract which he would not have entered into unless he himself could perform the transportation. It is believed that the apparent dis-similarity requires no further exposition.

The appellee has cited the *Brooks Transportation* case (supra) for the sole purpose of demonstrating to this court the extent to which the courts have followed the "primary business" doctrine as established by the Interstate Commerce Commission. We fail to see how the Brooks case can lend any support to the appellant. Supposedly it was

cited by the appellant in order to incorporate a statement made by the late Commissioner Joseph B. Eastman in connection with testimony taken at legislative hearings when the Transportation Act was being promulgated.

Specifically, appellant quoted the late Commissioner Eastman as follows (App. Br. 19):

> "Well, I was going to say that in instances where the trucker actually buys the product which he transports, that is a bonafide transaction and not merely a devise to evade regulation, he would be a private carrier."

The quotation as reported, 93 F. Supp. 517, p. 524, is entirely different in text and meaning, viz:

> "Well, I was going to say that in instances where the trucker actually buys the products which he transports, *if* that is a bonafide transaction and not merely a devise to evade regulation, he would be a private carrier". (Underscoring supplied.)

Further not only did appellant mis-quote the statement, but Mr. Eastman's quotation was in a sense abortive and apparently the defendant purposely avoided citing the complete import of the proceeding referred to. The trial court, in arriving at its decision in the Brooks case considered matters of legislative history on the subject of private carriage. Considerable of the testimony adduced before the Interstate Commerce Commission was cited by the court

and a full disclosure of that testimony shows that the committee aptly recognized the point involved when its members made consistent reference to private carriage and connected it with "a private concern" or "department stores", which statements naturally referred to an underlying primary business enterprise.

VIII

CONCLUSION

The antecedent history of conditions existing in the area of total transportation illuminates the necessary for regulation. The prevalence of practices thought to be inimical alike to public safety and economy was brought to the attention of Congress and the Motor Carrier Act of 1935 (now Part II, Interstate Commerce Act) resulted. The Act was designed to regulate motor carrier transportation, in the same manner as railroads have been regulated since 1887, with the view not only to promote a sound transportation system but to protect the public generally from "unsound economical conditions, unjust discriminations and undue preferences or advantages".

From the authorities it is gleaned that each case must be individually and subjectively considered. The tests to be applied are functional. Appellee submits that the facts in this case show that appellant is engaged in the primary business of transportation, that he "buys" and "sells" lum-

ber in order to transport it and in furtherance of his primary undertaking, that the revenue received is in fact compensation for compensation as such; and therefore that appellant is a carrier within purview of the Interstate Commerce Act.

It is respectfully urged that the Judgment and Order of the District Court be sustained and the appeal herein be dismissed.

Respectfully submitted,

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APPENDIX I

ITEM 1

Section 203 (a) of the Interstate Commerce Act (49 U.S.C. 303 (a)) defines the terms "common carrier by motor vehicle", "contract carrier by motor vehicle", "motor carrier", and "private carrier of property by motor vehicle" as follows:

> (14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation, shall continue to be considered to be and shall be regulated as transportation subject to Part I.
>
> (15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commence for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commence by motor vehicle, property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

ITEM 2

Section 206 (a) * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation; * * * (49 U.S.C. 306 (a)).

ITEM 3

Section 209 (a) * * * no person shall engage in the business of a contract carrier by motor vehicle in

interstate or foreign commerce on any public highway, * * * unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business; * * * (49 U.S.C. 309 (a)).

APPENDIX II

ITEM 4

ROUND TRIP MILES	IDAHO DESTINATION	BOARD FOOTAGE	NET REVENUE	PUBLISHED RATE	DEFENDENT'S REVENUE TRANSLATED IN TERMS OF RATES
734	Caldwell	16913	334.76	19.03	19.79
796	Weiser	18000	441.00	21.79	22.05
818	Nampa	16267	352.36	20.87	21.60
820	Homdale	15682	419.09	20.87	26.72
852	Caldwell	20231	446.09	21.79	22.05
910	Boise	13440	201.94	25.87	15.10
938	Boise	17382	442.88	23.63	25.48
936	Boise	12177	320.62	26.30	26.33
984	Mt. Home	20025	450.61	25.01	27.55
1028	Mt. Home	16000	590.60	25.92	36.91
1062	Mt. Home	18902	406.83	26.82	21.52
1106	Gooding	15793	386.93	27.77	24.50
1172	Buhl	17517	446.33	29.15	25.48
1172	Twin Falls	16112	420.52	29.15	26.10
1242	Arco	17903	452.93	30.99	25.30
1424	Blackfoot	18301	561.82	35.13	25.23
1424	Blackfoot	17722	421.26	35.13	23.78
1514	Blackfoot	12000	452.16	39.67	40.18